Remarks

Reconsideration of this Application is respectfully requested.

Claims 15-28 are pending in the application, with claims 15, 21, and 26 being the independent claims. Claims 1-14 were previously canceled. Claims 15, 17, 19, 21, 22, and 25-27 are sought to be amended. These changes are believed to introduce no new matter, and their entry is respectfully requested.

Based on the above amendment and the following remarks, Applicants respectfully request that the Examiner reconsider all outstanding objections and rejections and that they be withdrawn.

Double Patenting Rejection

In section 3 of the Office Action, claims 15-28 were rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-13 of U.S. Patent No. 6,681,255. However, the claims have been amended. Thus, the double patenting rejection is moot or no longer applies as set forth by the Examiner.

Therefore, Applicants respectfully request that the double patenting rejection be reconsidered and withdrawn and that claims 15-28 be passed to allowance.

Rejections under 35 U.S.C. § 102

Claims 15, 16, 21, 24, 25, and 28

In section 4 of the Office Action, claims 15, 16, 21, 24, 25, and, 28 were rejected under 35 U.S.C. §102(e) as being anticipated by U.S. Patent No. 6,560,243 to Mogul (hereinafter Mogul). Applicants respectfully traverse this rejection.

Independent claim 15, as amended, calls for calculating a wait time based on the target bandwidth and an aggregate bytes count, bytes$_{AGG}$, wherein bytes$_{AGG}$ is an aggregate number of bytes received from the server.

Mogul describes a system and method in which a receiving system transmits data to a sending system to control the rate at which the sending system transmits subsequent data packets. The receiving system delays its response to the sending system according to a calculated delay factor. However, nothing in Mogul teaches or suggests that the delay is calculated based on an aggregated bytes count, bytes$_{AGG}$, wherein bytes$_{AGG}$ is an aggregate number of bytes received from the server, as set forth in Applicants' claim 15.

In fact, the Office Action in section 11 concedes that Mogul does not explicitly disclose a byte count to calculate the wait time. Instead, the Office Action alleges that *any* bandwidth computation would "use a start time at the initiation of the retrieval of data, detecting or counting a number of bytes received, increment an aggregate byte count by the number of bytes received, calculating a current time, and subsequently calculating a wait time." However, Applicants disagree with this allegation.

The Office Action states *any* bandwidth computation would include aggregate bytes. However, Mogul computes a bandwidth, but the bandwidth computations in Mogul do not use an aggregate byte count. Instead, Mogul computes a bandwidth according to M*(D-1), where M is a model function and D is a delay factor. Thus, the assertion in the Office Action appears to be inaccurate. Therefore, Applicants find no suggestion in Mogul for an aggregate byte count.

In section 11, the Examiner states, "It should be obvious to one skilled in the art at the time of the invention that bandwidth calculations [are] usually based on bytes count and time, and different computations can be done in any number of ways using

these parameters: bandwidth, bytes count and time." Applicants respectfully traverse the Examiner's assertion and request evidence in support of the Examiner's position. M.P.E.P. § 2144.03. To establish a prima facie case of obviousness, all claim limitations must be taught or suggested by the prior art. The Examiner acknowledges his failure to cite references for all claim limitations, but relies instead on common knowledge or "well known" prior art. Therefore, Applicants respectfully request that the Examiner provide a reference or affidavit pursuant to M.P.E.P. § 2144.03 to support his assertion that it would be obvious to one of ordinary skill in the art at the time the invention was made to calculate a wait time based on the target bandwidth and an aggregate bytes count, bytes$_{AGG}$, wherein bytes$_{AGG}$ is an aggregate number of bytes received from the server, as set forth in Applicants' amended claim 15.

It is noted that it is impermissible to use hindsight to reconstruct an invention from cited references. "It is error to reconstruct the patentee's claimed invention from the prior art by using the patentee's claim as a 'blueprint.' When prior art references require selective combination to render obvious a subsequent invention, there must be some reason for the combination other than the hindsight obtained from the invention itself. It is critical to understand the particular results achieved by the new combination." *Interconnect Planning Corp. v. Feil*, 227 U.S.P.Q. 543 (Fed. Cir. 1985).

For at least the reasons set forth above, Applicants respectfully request reconsideration and withdrawal of the rejection of independent claim 15.

Independent claims 21 and 25, both as amended, also distinguish over Mogul for reasons similar to those set forth above with respect to amended independent claim 15, and in view of their own respective features.

Furthermore, claim 16, which depends from independent claim 15, claim 24, which depends from independent claim 21, and claim 28, which depends from independent claim 25, also distinguish over Mogul for reasons similar to those set forth above with respect to amended independent claim 15, and further in view of their own respective features.

Rejections under 35 U.S.C. § 103

Claims 17-20, 22-23, and 26-27

In section 11 of the Office Action, claims 17-20, 22-23, and 26-27 were rejected as being unpatentable over Mogul. Applicants respectfully traverse this rejection.

Applicants assert that claims 17-20, 22-23, and 26-27 also distinguish over Mogul for reasons similar to those set forth above with respect to amended independent claim 15, and further in view of their own respective features.

Thus, Applicants assert that claims 17-20, 22-23, and 26-27 are patentable over Mogul. Therefore, for at least the reasons set forth above, reconsideration and withdrawal of the rejection of claims 17-20, 22-23, and 26-27 is respectfully requested

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Conclusion

All of the stated grounds of objection and rejection have been properly traversed, accommodated, or rendered moot. Applicants therefore respectfully request that the Examiner reconsider all presently outstanding objections and rejections and that they be withdrawn. Applicants believe that a full and complete reply has been made to the outstanding Office Action and, as such, the present application is in condition for allowance. If the Examiner believes, for any reason, that personal communication will expedite prosecution of this application, the Examiner is invited to telephone the undersigned at the number provided.

Prompt and favorable consideration of this Amendment is respectfully requested.

Respectfully submitted,

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